IN THE

Supreme Court of the United States

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October Term, 1973

No. 73-970

DERICKSEN M. BRINKERHOFF
and the MEMBERS OF THE CLASS,
Petitioners,

v.

AMFAC, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Dericksen M. Brinkerhoff and the members of the class of minority shareholders respectfully pray that a writ of certiorari issue to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 13, 1973 and the *per curiam* order of the United States Court of Appeals for the Ninth Circuit on petition for rehearing entered on October 19, 1973.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals entered on September 13, 1973, not yet reported, appears in the Appendix hereto at pp. A1-A2. The *per curiam* order of

the Court of Appeals entered on October 19, 1973, not yet reported, appears in the Appendix hereto at p. A3. The opinion rendered by the United States District Court for the District of Hawaii on March 19, 1973, is reported at 59 F.R.D. 116 (D. Haw. 1973) and appears in the Appendix hereto at pp. A4-A24.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1973. A timely petition for rehearing and suggestion of appropriateness of rehearing *en banc* was denied on October 19, 1973, and this petition for writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

After plaintiff-petitioners were granted summary judgment on the issue of liability in this class and derivative action under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), the parties agreed upon and the district court approved a settlement providing for a reappraisal of the value of the stock of three Hawaiian plantation companies by an independent investment banker who, because of the substantial real estate involved, was to be assisted by an independent Hawaiian real estate appraiser. The appraisals were to be performed in accordance with specific, mandatory instructions jointly drafted by the parties. The appraisers disregarded their mandatory instructions, and petitioners never received the appraisals for which they bargained. The questions presented for review are:

1. In administering a settlement of an action under the federal securities laws providing for reappraisals of stock value pursuant to mandatory instructions jointly drafted by the parties, may the federal courts accept and

are the parties bound by appraisals which were not performed in accordance with the instructions?

2. Were petitioners denied their right to a hearing on their motion to set aside the appraisals for actual or constructive fraud by the district court's refusal to allow petitioners the opportunity to examine the only persons through whom actual or constructive fraud could be proved, the executive officers of the principal defendant, or to introduce into evidence the documents of the principal defendant which would substantiate petitioners' charges?

STATEMENT OF THE CASE

A. Introduction

This petition seeks review of decisions which discourage settlement of class action securities litigation in the efficient and economical manner achieved herein, undermine and thwart the remedial purposes of the federal securities laws, and result in so grave a miscarriage of justice as to cry out for this Court's review. The decisions below would permit a party *found guilty of federal securities law fraud* to retain the *multimillion dollar* bounty of its fraud by virtue of the lower courts' failure to enforce a settlement agreement and mandatory instructions to appraisers in accordance with the undisputed understanding and intent of the parties.

B. History of the Proceedings

This class and derivative action to enforce the federal securities laws arose out of the mergers of three sugar plantation companies, The Lihue Plantation Co., Ltd. ("Lihue"), Puna Sugar Co., Ltd. ("Puna") and Kekaha Sugar Co., Ltd. ("Kekaha") (hereinafter collectively referred to as the "Plantations"), into the principal defendant and respondent herein, Amfac, Inc. (hereinafter referred to as "Amfac").

The gravamen of the complaint was that, in violation of Sections 10(b) and 14(a) of the 1934 Act, 15 U.S.C. §78j and §78n, defendants had misrepresented in a joint proxy statement that an independent investigation and review of the exchange ratios had been performed and that the values determined for the Plantations' stock in computing the exchange ratios were fair. The principal damage issue arose out of the allegation that the substantial Hawaiian real estate holdings of the Plantations had been fraudulently undervalued, resulting in grossly unfair and inequitable exchange ratios.

Significantly, Amfac itself admitted in a brief in support of transfer of venue from the Central District of California to the District of Hawaii that the value of the Plantations' real estate was the principal issue in the case:

> "The *ultimate principal issue* in the action below will be the *valuation placed upon the landholdings of the plantation companies.* All of this land is located in Hawaii." (Italics added.)[1]

After extensive discovery, District Judge Tavares granted petitioners' motion for summary judgment against Amfac and other defendants on the issue of liability under Section 10(b) of the 1934 Act.[2]

C. The Settlement Agreement

As a result of arduous and extensive negotiations, and to avoid the necessity for three separate jury trials on the issue of damages, a settlement was agreed upon which provided for the expeditious and economical independent appraisal of the value of the real estate and other assets of the Plantations and concomitant determination of the fair value of the Plantations' stock.

The Stipulation of Settlement provided for court appointment of an independent investment banker to reappraise the value of the capital stock of each of the Plantations *in the precise manner agreed upon by the parties*, as reflected in detailed written instructions *jointly drafted* by the parties and delivered by Judge Tavares. The investment banker was to be instructed to consider *all*

1. This admission appears at page 7 of the brief which Amfac filed in the Ninth Circuit in opposition to a petition for a writ of mandamus from the order transferring this case under 28 U.S.C. § 1404(a) from the Central District of California to the District of Hawaii.

2. Judge Tavares also stated that he would have granted petitioners' motion for summary judgment on the issue of liability under Section 14(a) as well but for the exemption of the Plantations' securities from the proxy solicitation requirements of Section 14(a). (Transcript of Proceedings, May 5, 1971, at pp. 5-6.)

relevant value criteria which expressly were to include, but not be limited to, market price, *net asset value* and investment value. In light of the recognition by the parties that the value of the real estate, all of which was located in Hawaii, was the "ultimate principal issue" of the case, the Stipulation of Settlement further expressly provided that the independent investment banker was to be assisted by an independent Hawaiian real estate appraiser, Gilbert W. Root ("Root"), whose *sole* duty it would be to *value the "substantial real estate holdings"* of the Plantations at the time of the mergers for the investment bankers' use in the consideration of *net asset value*. The investment banker and real estate appraiser were to serve as officers of the court under the court's sole direction and supervision and their determination of the value of the capital stock of each of the Plantations was to be final and binding.[3]

Despite the fact that the net asset value of the Plantations' substantial real estate holdings was the most vital of all issues, the appraisers admittedly disregarded their instructions and failed to make a net asset valuation of ninety-two percent (92%) of the real estate holdings of one plantation and fifty percent (50%) of the real estate of another, and thereby short-changed the minority shareholders by many millions of dollars. Thus, the appraisers demonstrably failed to conduct their assigned duties in accordance with the jointly drafted *mandatory* instructions and petitioners have never received the independent appraisals for which they bargained.

D. The Mandatory Instructions

The instructions,[4] which were *jointly drafted* by the

3. After a hearing pursuant to notice, Judge Tavares approved the settlement, dismissed the action except for the express reservation of jurisdiction for the purpose of implementing, supervising and enforcing the terms of the settlement, and appointed Eastman Dillon, Union Securities & Co. ("Eastman Dillon") as the investment banker and Root as the real estate appraiser to perform the agreed upon appraisals.

4. The instructions to the appraisers appear in the Appendix hereto at pp. A25-A28.

parties pursuant to the Stipulation of Settlement, first emphasized the importance of the Plantations' substantial real estate holdings and then, in recognition of the significance of the value of the real estate, instructed Eastman Dillon that in consideration of net asset value it *must* "utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii as *real estate appraiser*," whose *sole duty* it would be to appraise the *value of the Plantations' real estate* (Appendix ["App."], pp. A25-A27):

> "The purpose of this hearing is to appoint Eastman Dillon, Union Securities & Co. and Gilbert W. Root, as officers of this Court, to perform independent appraisals of the value of the capital stock of the Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. (which I shall hereinafter refer to as the 'Plantations') *in accordance with the settlement of this action* and to instruct the Court's appraisers as to the scope of their duties and the **manner** in which they shall perform them."
>
> * * *
>
> "The settlement of this action provides that the value of the common stock of the Plantations shall be reappraised by an independent investment banker who, **in light of the substantial real estate holdings** and leaseholds of the Plantation companies, **shall** be assisted by an independent **real estate** appraiser. . . ."
>
> * * *
>
> ". . . You **shall** consider all relevant value criteria which **shall** include but not necessarily be limited to market price, **net asset value** and investment value. *In the consideration of net asset value*[5] *you* **shall** *utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii* **as real estate appraiser** who, under your

5. The vital importance to the parties of the net asset value of the real estate is illustrated, *inter alia*, by its highlighted and individualized treatment in the jointly drafted instructions.

supervision, **shall** appraise the value of such of the *real estate* of each of the three Plantations as directed by you. . . .

"Mr. Root, it is your duty, *as the real estate appraiser, to appraise the value of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use* **in the consideration of net asset value.**[6] Although you are to perform your appraisals under the direction of Eastman Dillon, you are to reach your own independent judgment *as to the value of the real estate appraised* and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession." (Italics and boldface added.) (Footnotes added.)

There was no dispute below as to what the parties intended by their instructions:

(1) **Amfac conceded** in its comments on the appraisals that the term "net asset value" as used in both the instructions to the appraisers and the Stipulation of Settlement meant the theoretical liquidation value of the Plantations' assets, as defined in Delaware cases.[7] Thus, Amfac admitted (Record on Appeal ["Rec."], pp. 5802-03):

"Net asset value is defined as a theoretical liquidating value to which the share would be entitled upon liquidation of the company."

* * *

"The area in which courts have devoted the most consideration to the valuation of capital stock concerns

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6. Root was directed by Eastman Dillon to appraise *all* of the real estate of the three Plantations. (Transcript of Proceedings ["Tr."], December 4, 1972, at pp. 25, 26, 36, 140, 200.)

7. See *e.g., Poole v. N. V. Deli Maatschappij*, 243 A.2d 67 (Del. Sup. Ct. 1968); *Swanton v. State Guaranty Corp.*, 215 A.2d 242 (Del. Ch. Ct. 1965).

the appraisal of stock held by dissenting stockholders, and the expertise of the Delaware courts in this field is generally acknowledged."

(2) **Amfac conceded** in its comments on the appraisals that theoretical liquidation value *must be weighed* by the appraisers as one element in the value of the Plantations' stock. As Amfac itself stated (Rec., p. 5804):

> "The facts presented by the valuation of the stock of the Plantations is considerably different from that presented in the *Brown* case, but the principal of law established by the case is clear—**all three valuation methods must be weighed** *in arriving at a determination of the value of the stock.* This method of appraisal is not limited to dissenters rights cases as shown by Poole v. N. V. Deli Maatschappij, 43 Del. Ch. 241, 224 A.2d 260 (1966), which involved a class action on behalf of the minority shareholders of American Sumatra Tobacco Corporation against a controlling corporation for inducing the sale of stock by fraudulent misrepresentation in a tender offer. The Delaware Supreme Court held that *the method of determining the actual value of stock in fraud cases is the same as in evaluation in dissenting stock appraisal proceedings and that in both situations consideration* **must** *be given to investment value, market price and* **asset value."** (Italics and boldface added.)

Thus, all parties were in agreement that Root was *required* to appraise the theoretical liquidation value of the Plantations' substantial real estate holdings, Eastman Dillon was *required* to appraise the theoretical liquidation value of the non-real estate assets and Eastman Dillon was *required* to consider and give some weight to the theoretical liquidation value of *all assets* in fixing the fair value of the Plantations' stock. *This the appraisers admittedly failed to do!*

E. The Appraisals

The reports filed by Eastman Dillon and Root revealed that *Root never appraised the theoretical liquidation value of any of the thousands of acres of real estate employed in the Plantations' sugar operations,*[8] Eastman Dillon never appraised the theoretical liquidation value of any of the other assets employed in sugar operations and, therefore, Eastman Dillon could not and did not include any amount for the liquidation value of said real estate and other assets in its appraisal of the Plantations' stock. Instead, Eastman Dillon valued the assets employed in the sugar operations *solely* on an investment or capitalization of earnings basis. As a result, the appraisers understandably found the value of a share of each Plantations' stock to be worth *less* than the value of the Amfac stock received.[9]

The magnitude of the injustice perpetrated was demonstrated below, *inter alia*, by the appraisers' testimony that lands employed in sugar operations by a sugar plantation adjacent to Lihue were liquidated for as much as $28,000 *per acre* (Tr., December 4, 1972, at pp. 47-49, 317-25) and Lihue's own sugar lands were condemned by or sold to the government for as much as $14,800 *per acre* (*Id.*, pp. 428-

8. In the case of one of the plantations, Lihue, 29,266 acres out of its total of 31,826 acres of land, or approximately 92% of all of its land, were employed in sugar operations. (Tr., December 4, 1972, at p. 30.) In the case of another, Puna, 9,016 acres out of its total of 18,257 acres of land, or nearly 50%, were employed in sugar operations. (Rec., pp. 6361, 6369-71.)

9. It should be noted that petitioners did not contend below and do not now contend that they were entitled to receive the full net asset or liquidation value of the Plantations' assets. Petitioners vigorously assert, however, that under the Stipulation of Settlement and the jointly drafted instructions, Eastman Dillon was required to include the "net asset value," *i.e.* the liquidation value, of *all* of the Plantations' assets, including the real estate and other assets employed in sugar operations, as one of the essential criteria of the value of the Plantations' stock.

32). Even if Lihue's sugar lands had an average liquidation value of only $1,000 per acre, the asset value of Lihue, exclusive of all of the other valuable assets employed in sugar operations, would be over $29,000,000. Shockingly, however, without even knowing the liquidation value of Lihue's sugar lands and other assets, Eastman Dillon valued Lihue's *entire* sugar operation, including but not limited to its 29,266 acres of land, at $5,000,000 calculated *solely* on the basis of a capitalization of Lihue's admittedly distressed earnings, thereby depriving the minority shareholders of any credit for these extraordinarily valuable lands and giving Amfac, who had been found guilty of securities law fraud, a multi-million dollar windfall.[10]

Ironically, although the principal purpose of this lawsuit and the settlement was to obtain fair consideration of the underlying land values, and although Root was appointed for the *sole* purpose of performing a net asset appraisal of the real estate, the net asset value of the thousands of acres of plantation real estate employed in sugar operations was never determined and no amount whatsoever reflecting that value was included in the value of the Plantations' stock.

F. Petitioners' Motion to Set Aside Appraisals

On November 6, 1972, petitioners filed a motion to set aside the appraisals on the grounds: (1) that the appraisers failed to perform in accordance with the mandatory instructions and the settlement agreement and (2) the appraisals were tainted by actual or constructive fraud. On November 24, 1972, District Judge Pence summoned local counsel to his chambers and announced that Judge Tavares, who had presided over all proceedings to that point including the settlement proceedings, was ill and that Judge Pence would preside over the hearing on the motion to set aside the appraisals. Judge Pence also ruled, *without any hearing what-*

10. The appraisers similarly disregarded their instructions in appraising Puna.

soever, that only the appraisers would be permitted to testify at the hearing, and quashed subpoenas which petitioners had served on executive officers of Amfac for the purpose of proving that Amfac had made fraudulent misstatements and omissions to the appraisers. (Tr., November 24, 1972, at pp. 2-3, 12-13, 15-17; Rec., pp. 6039-61.)

The testimony of Root and Frederick Pape ("Pape"), the Eastman Dillon partner who performed and supervised the appraisals, conclusively established that although Pape had instructed Root to appraise *all* of the real estate owned by the Plantations, **no net asset or theoretical liquidation value appraisal had been performed of any of the real estate employed in sugar operations.** (Tr., December 4, 1972, at pp. 43, 46, 51, 58, 70-71, 207-08, 302-03, 396, 398.) For example, Root testified (*Id.*, p. 43):

> "Q. What is the value that you, as a real estate appraiser, give to the assets of Lihue which were used, in your opinion, the twenty-nine-some-odd thousand acres, which were, as you say, essential for the production of sugar? What was the value that you placed on that as an MAI appraiser?
>
> **A. I did not place a value on it."**[11] (Boldface added.)

Similarly, Pape testified (*Id.*, p. 302-03):

> "Q. Can you tell us in court today what the value on liquidation of the 29,266 acres of Lihue involved in sugar operations would be?
>
> * * *
>
> THE WITNESS: No." (Boldface added.)

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11. Root was required under the terms of the settlement agreement and instructions to appraise the net asset or *theoretical* liquidation value for Eastman Dillon's mandated use in the consideration of net asset value. Significantly, Root testified that he *could have performed* a liquidation appraisal, but did not do so. (Tr., December 4, 1972, pp. 50-51, 70-71.)

Judge Pence succinctly summarized the testimony of Root and Pape when he stated (*Id.*, p. 207-08):

> "THE COURT: I'll state frankly, **there is no one in the courtroom who knows what 29,000 acres of Lihue would be worth.** On all of the evidence before me, that's the only conclusion." (Boldface added.)

Incredibly, Root conceded that the real estate employed in sugar operations "unquestionably [had] some potential future value," but that he had not determined what that value was. Thus, Root could *not* state whether the future value of Lihue's substantial real estate holdings was *more or less* than the $5,000,000 valuation determined by Eastman Dillon *solely* on the basis of a capitalization of earnings. (*Id.*, pp. 114-155.) When Pape was asked what value was given for the unquestionable future potential of the sugar lands, he admitted: "*We gave no value to that.*" (Id., pp. 290-97.)

G. Proof of Fraud

At the hearing, petitioners made an offer of proof that Amfac had made numerous representations of material facts to the appraisers, relied upon by the appraisers in valuing the Plantations' stock, which were flatly contradicted by Amfac's own documents and records. (Tr., December 4, 1972, at pp. 433-41.) Nonetheless, Judge Pence, who earlier had quashed petitioners' subpoenas without any hearing, denied petitioners' renewed request to examine or depose any of the executive officers of Amfac to support petitioners' allegation of actual or constructive fraud, thereby rendering proof thereof impossible.[12]

H. The Decision of the District Court

On March 19, 1973, Judge Pence issued his decision denying petitioners' motion to set aside the appraisals.

12. Judge Pence also refused to admit into evidence any of the contradictory Amfac documents. (Tr., December 4, 1972, at pp. 436-40.)

(App., pp. A4-A24.) In so ruling, however, Judge Pence *did not* find that there was any disagreement or misunderstanding among the parties as to the meaning of the instructions to the appraisers which they jointly had drafted. To the contrary, *Judge Pence found that all parties "assumed that the Delaware definition is the only way 'net asset value' can be considered, i.e., net asset value must be equated with liquidation value."* (App., p. A17). (Italics added.) Notwithstanding the clear intent of the parties who, in recognition of the vital importance of the net asset value of the Plantations' substantial real estate holdings, jointly drafted both the settlement agreement and the carefully worded instructions to the appraisers, and ignoring the elaborate efforts of petitioners, to insure a fair and independent appraisal of the substantial real estate holdings of the Plantations, Judge Pence concluded that "Eastman Dillon . . . was not compelled to operate under Delaware's [and the parties'] definition of net asset value" (App., p. A18), but could employ the "more general definition" of net asset value (App., p. A19). Judge Pence further found that the appraisers in fact had performed their appraisals "within the guidelines of the more general definition of net asset value, rather than of the definition established by the Delaware courts [and the parties]." (App., p. A22.)

Having precluded petitioners from examining or deposing any of Amfac's officers and from introducing into evidence any contradictory Amfac documents, Judge Pence also found the record devoid of any evidence of fraud in the appraisals. (App., pp. A10-A11.)

I. The Decision of the Court of Appeals

On May 16, 1973, petitioners filed their Notice of Appeal, and on or about August 10, 1973, respondent Amfac filed with the Court of Appeals a motion to dismiss on the grounds that the Stipulation of Settlement provided that the appraisers' value determination would be final and

binding and therefore precluded even a challenge based upon the charge that the appraisers had disregarded their mandatory instructions.

On August 14, 1973, petitioners filed their opening brief on the merits and on August 20, 1973, filed their response in opposition to Amfac's motion to dismiss, relying, *inter alia*, upon *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958). Significantly, in *Marceron*, then Circuit Judge and now Chief Justice Warren Burger held that the issue of whether appraisers had properly interpreted their instructions and had performed their duties in the manner instructed were questions purely of law and subject to *de novo* review by a court of appeals notwithstanding an agreement that the values determined by the appraisers would be binding.

On September 13, 1973, 11 days *prior* to the time for the filing of petitioners' reply brief on the merits, and without oral argument or notice that the case would be submitted without oral argument in accordance with Rule 3(a) of the Local Rules of the Ninth Circuit, the *motion panel* entered a *per curiam* Memorandum Opinion *denying* Amfac's motion to dismiss the appeal, but affirming the judgment below on the merits. (App. pp. A1-A2.) The motion panel's Memorandum Opinion stated simply that "[w]e have examined Judge Pence's construction of Judge Tavares' instructions to the appraisers, and we have concluded that Judge Pence did not err in his interpretation of them." (App., p. A1.) Significantly, however, in a marked departure from the holding of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc., supra*, the motion panel erroneously refused a *de novo* review (App., p. A2):

> "Unfortunately for appellants, the scope of judicial review available to them on the basis of their stipulation and the orders of the court predicated

upon their agreement is far more restrictive than that which would have been accorded without the settlement agreement."

Despite the fact that Judge Pence arbitrarily had rejected petitioners' efforts to establish their charge of fraud, the motion panel also held that "[t]o the extent that extrinsic fraud was charged, Judge Pence found against the appellants and there is no basis in the record to upset that determination.' (App., p. A1).

On September 24, 1973, petitioners filed a petition pursuant to Rules 35 and 40 for reconsideration of the *per curiam* memorandum opinion affirming judgment, for leave to file their reply brief on the merits, for oral argument on the merits and suggestion of appropriateness of reconsideration *en banc*, to which their reply brief on the merits was appended. On October 19, 1973, the same motion panel filed a *per curiam* order allowing petitioners to file their reply brief, but denying oral argument and, without further explanation, "adhere[d] to its prior Memorandum [Opinion]." (App., p. A3.) No disposition of petitioners' suggestion of appropriateness of reconsideration *en banc* was ever announced.

REASONS FOR GRANTING THE WRIT

A. The Decisions Below Undermine and Thwart Important Public Policies in the Administration and Enforcement of the Federal Securities Laws.

(1) The Decisions Below Deter Expeditious Settlement of Federal Securities Class Action Litigation.

This case is of exceptional importance to the courts, to the national corporate community, to the federal securities law bar and to the administration and enforcement of the federal securities laws because its resolution will determine the future likelihood of efficient and economical settlements of securities cases which provide for Court-supervised appraisals pursuant to jointly drafted instructions rather than protracted and expensive jury trials.

There was no dispute between the parties as to the meaning of the mandatory, jointly drafted instructions. **Amfac conceded** that "net asset value is defined as a theoretical liquidating value to which the share would be entitled upon liquidation of the company" and **"must be weighed** in arriving at a determination of the value of stock." (Rec., p. 5804.) (Boldface added.) The district court found that all parties "assumed that the Delaware definition is the only way 'net asset value' can be considered, *i.e.*, net asset value must be equated with liquidation value." (App., p. A17.) Nonetheless, despite the clear contrary understanding and intent of the parties and despite the fact that the value of the Plantations' substantial real estate holdings was the "ultimate principal issue" in the case, the district court concluded that the appraisers were "not compelled to operate under Delaware's [and the parties'] definition of net asset value" (App., p. A18) and approved appraisals which *disregarded the mandatory instructions*[13] and decimated the settlement agreement by

13. "You **shall** consider all relevant value criteria which **shall** include . . . net asset value. . . . In the consideration of net asset

valuing the Plantations' real estate employed in sugar operations *solely* on the basis of a capitalization of earnings *without any appraisals of or weight given to the net asset or theoretical liquidation value of said lands.* This conclusion abrogated the settlement agreement and denied the defrauded parties the very consideration for which they had bargained, *i.e.* independent appraisals performed in the precise manner agreed upon by the parties and mandated by the jointly drafted instructions.

To allow Judge Pence's reported decision[14] to stand in light of his express recognition that the appraisers' performance of their duties did not comport with what the parties intended and understood their instructions to require would be to sound the death knell for settlement of federal securities class actions in the fair, efficient and economical manner achieved herein.

(2) The Decisions Below Permit Amfac to Retain the Extraordinarily Valuable Bounty of its Fraudulent Conduct.

Beyond question, the 1934 Act is remedial legislation and, as such, must be construed broadly to effectuate its purposes. "One of its central purposes is to protect investors through the requirement of full disclosure," *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), and private enforcement of the 1934 Act is vital to the fulfillment of its remedial purposes. *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

A necessary corollary of the remedial purposes of the 1934 Act and the importance of private litigation to the achievement of those purposes is that those who violate the Act's provisions must be made to fully disgorge their ill-

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Note 12—*Continued*

value you **shall** utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii, *as real estate appraiser* . . . ." (App., p. A26) (Italics and boldface added.)

14. 59 F.R.D. 116 (D. Haw. 1973).

gotten gains. Here, summary judgment on liability under Section 10(b) of the 1934 Act was granted against Amfac. An adjudication of liability under the 1934 Act would be a hollow and meaningless gesture with no deterrent effect whatever if wrongdoers such as Amfac were permitted to escape with the fruit of their fraud. As Chief Judge Aldrich stated in *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965), *cert. denied*, 382 U.S. 879 (1965): "It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them . . . it is simple equity that a wrongdoer should disgorge his fraudulent enrichment."

In *J. I. Case Co. v. Borak, supra*, this Court emphasized the duty and power of the federal courts to provide such remedies as are necessary to vindicate federal rights and effectuate the congressional purpose (377 U.S. at 433):

> "[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. . . ."
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> * * *
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> ". . . 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. . . .'"

Just as the 1934 Act itself must be broadly and liberally construed in a manner which effectuates its remedial purposes, so too proceedings to implement a settlement after a party has been found guilty of federal securities law fraud must give effect to the remedial purpose of compelling the wrongdoer to disgorge his illegal gains. Petitioners bargained away their right to jury trials on the issue of damages in consideration for a court-supervised independent appraisal to determine stock values *pursuant to jointly drafted mandatory instructions.* The detailed instructions were drafted by the parties having

thorough knowledge of the facts and history of the litigation and were a *sine qua non* to any settlement agreement. Through inadvertence, ignorance, fraud or otherwise, the appraisals challenged herein have *left unvalued* what the parties agreed was the "ultimate principal issue" of the case and thereby have permitted the wrongdoer to escape with its multimillion dollar spoils.

From the outset of this litigation, it was recognized by all parties that the "ultimate principal issue" was the value of the Plantations' substantial real estate holdings. The appraisals were agreed upon for the purpose of ascertaining this value and incorporating it into the fair value of the Plantations' stock. It was for this reason alone that the appointment of real estate appraiser Gilbert W. Root, MAI, was expressly incorporated in the instructions and "net asset value" was highlighted by separate and individualized attention therein. None of the elaborate procedures for instructing the appraisers would have been necessary if the parties had intended to permit them, as Judge Pence has done, to disregard their instructions and proceed in their unfettered discretion.

Moreover, although the record was replete with instances in which the appraisers, in performing their appraisals, relied upon self-serving representations of Amfac, representations contradicted by Amfac's own documents and records, the district court denied petitioners even a minimal opportunity to examine Amfac's officials to establish the false and fraudulent nature of those representations[15] and refused to admit into evidence the contradictory Amfac documents.

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15. Other than the statement of the motion panel of the Ninth Circuit that "[t]o the extent that extrinsic fraud was charged, Judge Pence found against the appellants and there is no basis in the record to upset that determination" (App., p. A1), the Court of Appeals never explained on what basis it affirmed Judge Pence's refusal to permit petitioners to establish a record as to fraud by examining the only persons through whom the fraudulent nature of Amfac's representations to the appraisers could be demonstrated, *i.e.* Amfac's executive officers.

This Court should review these decisions to give substance to the remedial purposes of the 1934 Act.

B. The Refusal of the Court of Appeals to Perform a *De Novo* Review of Whether the Appraisers Performed their Appraisals in Accordance with their Instructions is in Conflict with the Decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

In direct conflict with the decision of the District of Columbia Circuit in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958), the Ninth Circuit here exercised a restrictive scope of judicial review to determine whether the appraisers had performed their appraisals in accordance with their instructions. In *Marceron*, a lease agreement similarly provided for appraisals to be binding upon the parties. The trial court refused to review the appraisers' interpretation of their instructions and held that the parties were bound by the appraisal. On appeal, then Circuit Judge of the District of Columbia Circuit and now Chief Justice Warren Burger reversed the trial court, declaring (258 F.2d at 158-59):

> "Thus it appears that the appraisers' construction of the formulae can properly be reviewed by the trial court *and* by us. The appraisers' construction of the formulae, as distinguished from appraisal of value, being untra vires, is clothed with no presumption of correctness. The trial court's affirmance of the appraisers' determination is likewise no obstacle to *de novo* construction in this court, first because the trial court's decision was based partly on an erroneous ground, namely that the appraisers' interpretation of their charter of authority was conclusive on the parties; and second, because unlike the question of land or rental value, **it is one purely of law** and involves only contruction of a written instrument." (Italics and boldface added.)

Had the Ninth Circuit reviewed *de novo* the appraisers' interpretation of their instructions, it would have been compelled to reverse in light of the facts that: (1) the parties were in agreement that under the Stipulation of Settlement and jointly drafted instructions, the appraisers were *required* to determine the theoretical liquidation value of the Plantations' real estate employed in sugar operations and to give some weight to said value in the ultimate determination of the value of the Plantations' stock; and (2) the appraisers admittedly did not determine the theoretical liquidation value of said real estate and, therefore, gave no weight to that criteria in fixing the value of the Plantations' stock.

This Court should resolve this conflict between the Circuits and correct the manifest injustice to the minority shareholders of these Plantations.

CONCLUSION

By disregarding their instructions and failing to appraise and include the most essential element of the value of the Plantations' stock, *i. e.*, the theoretical liquidation value of their substantial real estate holdings, the appraisers have deprived the minority shareholders, *who had been awarded summary judgment on liability*, of the appraisals for which they bargained in the settlement of this action. Thus, Amfac, a party found guilty of securities law fraud, has been permitted to retain the extraordinarily valuable bounty of its fraud.

Moreover, by denying petitioners' the opportunity to examine Amfac's officers to support their allegations, Judge Pence deprived petitioners of the hearing on the issue of fraud to which they were entitled.

For the foregoing reasons, it is respectfully submitted that this Honorable Court should issue a writ of certiorari

to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1973, three copies of this Petition for a Writ of Certiorari were served, by first class air mail, postage prepaid, on the attorneys for respondent Amfac, Inc. I further certify that all parties required to be served have been served.

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